

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

	) Case No. 13-cv-1953
ALEX ANG and KEVIN AVOY,	)
individually and on behalf of all	) ORDER GRANTING MOTION TO
others similarly situated	) <u>DISMISS</u>
	)
Plaintiffs,	)
	)
v.	)
	)
WHITEWAVE FOODS COMPANY, DEAN	)
FOODS COMPANY, WWF OPERATING	)
COMPANY, and HORIZON ORGANIC	)
DAIRY LLC,	)
	)
Defendants.	)
	)

**I. INTRODUCTION**

Plaintiffs bring this putative class action in connection with Defendants' alleged misbranding of various products containing evaporated cane juice, including soymilk, almond milk, lowfat milk, and yogurt products. ECF No. 1 ("Compl."). Defendants now move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 17 ("MTD"). The motion is fully briefed, ECF Nos. 31 ("Opp'n"), 28 ("Reply"),<sup>1</sup> and appropriate for determination without

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<sup>1</sup> Plaintiffs filed a "corrected" opposition brief after Defendants filed their reply.

1 oral argument per Civil Local Rule 7-1(b). For the reasons set  
2 forth below, Defendants' motion is GRANTED and this action is  
3 DISMISSED WITH PREJUDICE.

4  
5 **II. BACKGROUND**

6 Plaintiffs target two types of products sold by Defendants:  
7 the "Silk Products" and the "Horizon Products" (collectively, the  
8 "Products"). The Silk Products are a variety of plant-based  
9 beverages, including "Silk Vanilla Soymilk," "Silk Pure Almond All  
10 Natural Original Almond Milk," and "Silk Pure Coconut Original  
11 Coconut Milk" (hereinafter, the "Silk Products"). See Compl. ¶¶ 6,  
12 95. The Horizon Products are a variety of yogurt and milk  
13 products, including Organic Whole Vanilla Yogurt, Tuberz yogurt  
14 tubes (collectively, the "Horizon Yogurt Products"), and Horizon  
15 Organic Vanilla Lowfat Milk. The labels of all of the Products  
16 list "All Natural Evaporated Cane Juice" or "Organic Evaporated  
17 Cane Juice" (hereinafter, "evaporated cane juice" or "EJC") as an  
18 ingredient. Id.

19 Plaintiffs allege that the Products were misbranded in three  
20 ways. First, Plaintiffs claim that, pursuant to US Food and Drug  
21 Administration ("FDA") guidelines, Defendants should have used the  
22 terms "sugar" or "dried cane syrup" instead of EJC on the Products'  
23 labels (the "ECJ Claims"). Second, Plaintiffs claim that  
24 Defendants misbranded the Silk Products by using names like  
25 "soymilk," "almond milk," and "coconut milk," since the Silk  
26 Products are plant-based, and the FDA defines "milk" as a substance  
27 coming from lactating cows (the "Milk Claims"). Third, Plaintiffs  
28 allege that, pursuant to FDA guidelines, the Horizon Yogurt

1 Products are mislabeled as yogurt because they contain evaporated  
2 cane juice, which is allegedly nothing more than sugar.

3 Plaintiffs filed this suit on April 29, 2013, and assert  
4 claims for (1)-(3) unfair, unlawful, and fraudulent practices in  
5 violation of the California Unfair Competition Law ("UCL"), Cal.  
6 Bus. & Prof. Code § 17200, et seq.; (4) & (5) misleading and  
7 deceptive advertising and untrue advertising in violation of the  
8 California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code  
9 17500, et seq.; (6) violation of the California Consumers Legal  
10 Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.; and (7)  
11 restitution based on unjust enrichment/quasi-contract. Plaintiffs  
12 bring this action on behalf of themselves and, pursuant to Rules  
13 23(b)(2) and 23(b)(3), all persons in the United States who  
14 purchased the Products.

15 On April 8, 2013, before Plaintiffs filed the instant action,  
16 another food-labeling class action was filed against Defendants in  
17 U.S. District Court for the Southern District of Florida.<sup>2</sup> ECF No.  
18 18 ("Defs.' RJN") Ex. 14 ("Singer Compl."). The plaintiff in the  
19 Florida action, Barbara Singer ("Singer"), targeted many of the  
20 same products as Plaintiffs. Compare Compl. ¶ 95 with Singer Compl.  
21 ¶ 13. Like Plaintiffs, Singer alleged that these products were  
22 misbranded because EJC "is nothing more than sugar, cleverly  
23 disguised." Singer Compl. ¶ 2. Singer also relied on many of the  
24 same FDA guidelines as Plaintiffs. Compare Compl. 48, 57-61 with  
25 Singer Compl. ¶¶ 16-19.

26 The parties to the Florida action subsequently reached a class  
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28 <sup>2</sup> That action is captioned Singer v. WW Operating Company, Case No. 13-cv-2132 (S.D. Fla.) (hereinafter, the "Florida action").

1 settlement. On April 19, 2013, the Florida court preliminarily  
2 approved a settlement, defining the settlement class as all persons  
3 who, from January 1, 2005 to the present, purchased Defendants'  
4 ECJ-labeled products throughout the United States. RJN Ex. 16.  
5 The Court required class notice to be published in USA Today and on  
6 a website established for the purpose of providing notice, finding  
7 this notice to be the best practicable under the circumstances and  
8 to be fully compliant with the requirements of Federal Rule of  
9 Civil Procedure 23 and of due process. Id. Plaintiffs, absent  
10 class members in the Florida action, did not object to the  
11 settlement within the timeline set forth by the Florida court. On  
12 June 28, 2013, the Florida court granted final approval of the  
13 settlement (hereinafter, the "Singer Settlement").

14 Plaintiffs subsequently filed a motion to intervene in the  
15 Florida action and a motion to set aside the Singer Settlement.  
16 Those motions were denied on October 8, 2013. ECF No. 35-1 ("Oct.  
17 8 Order"). Among other things, the Florida court found that  
18 Plaintiffs were provided with adequate notice of the Florida action  
19 and that Plaintiffs' interests were adequately represented in that  
20 action.

### 21 22 **III. LEGAL STANDARD**

23 A motion to dismiss under Federal Rule of Civil Procedure  
24 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
25 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
26 on the lack of a cognizable legal theory or the absence of  
27 sufficient facts alleged under a cognizable legal theory."  
28 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.

1 1988). "When there are well-pleaded factual allegations, a court  
2 should assume their veracity and then determine whether they  
3 plausibly give rise to an entitlement to relief." Ashcroft v.  
4 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court  
5 must accept as true all of the allegations contained in a complaint  
6 is inapplicable to legal conclusions. Threadbare recitals of the  
7 elements of a cause of action, supported by mere conclusory  
8 statements, do not suffice." Id. (citing Bell Atl. Corp. v.  
9 Twombly, 550 U.S. 544, 555 (2007)).

#### 10 11 **IV. DISCUSSION**

12 Defendants now move to dismiss the instant action on the  
13 grounds that it is barred by res judicata. Alternatively,  
14 Defendants argue that Plaintiffs' claims are preempted or are  
15 implausible. As set forth below, the Court finds that the final  
16 judgment in the Florida action precludes Plaintiffs from bringing  
17 their EJC and Yogurt Claims. Further, the Court finds that  
18 Plaintiffs' Milk Claims are either preempted or implausible.

##### 19 **A. Res Judicata**

20 Defendants argue that the Singer settlement is res judicata  
21 with respect to Plaintiffs' EJC, Milk, and Yogurt claims. MTD at  
22 8. Res judicata bars relitigation of claims that were raised or  
23 could have been raised in a prior action. Owens v. Kaiser Found.  
24 Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001). The doctrine  
25 is applicable whenever there is (1) identity or privity between the  
26 parties in the first and second action, (2) a final judgment on the  
27 merits, and (3) an identity of claims. Id.

28 As to the first requirement, Plaintiffs do not dispute that

1 they were class members in the Florida action. However, Plaintiffs  
2 argue that their interests were inadequately represented in that  
3 action and that they were provided with inadequate notice of the  
4 proceedings. Opp'n at 6. Both of these arguments were rejected by  
5 the Florida court when it denied Plaintiffs motions to intervene  
6 and set aside the Singer Settlement. The Court declines to revisit  
7 those issues now and finds that the first requirement of res  
8 judicata has been met.

9 With respect to the second requirement, Plaintiffs argue that  
10 there was no final judgment in the Florida action because the  
11 Florida court did not issue a separate document setting out a final  
12 judgment. This argument lacks merit. The Florida court's order  
13 approving the class settlement expressly states Defendants may  
14 "file the Settlement Agreement and/or this Judgment in any action .  
15 . . based on principles of res judicata . . . or any theory of  
16 claim preclusion." RJN Ex. 19 ¶ 9. The order refers to itself as  
17 a judgment four other times and also uses the phrase "IT IS HEREBY  
18 ORDERED, ADJUDGED AND DECREED." Moreover, Plaintiffs have  
19 essentially conceded the finality of the order by appealing it to  
20 the Eleventh Circuit.

21 As to the third requirement of res judicata, Plaintiffs do not  
22 dispute that there is an identity of claims as to the EJC and  
23 Yogurt Claims. Nor could they. The Singer Settlement discharges  
24 all claims "arising from, or in any way whatsoever relating to the  
25 use of the term evaporated cane juice with respect to [Defendants']  
26 Products . . . ." RJN Ex. 19 § VI. Both the EJC and Yogurt claims  
27 are predicated on Defendants' use of the term EJC. Indeed,  
28 Plaintiffs' EJC claims are practically identical to Singer's.

1 While the Yogurt Claims were not raised in the Florida action, they  
2 are premised on the same theory -- that EJC is equivalent to sugar  
3 -- and thus arise out of the same nucleus of operative facts. See  
4 Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000)  
5 (Central criterion in determining whether there is an identity of  
6 claims is whether the two suits arise out of the same transactional  
7 nucleus of facts.)

8 The parties dispute whether there is an identity of claims  
9 with respect to the Milk Claims. Defendants argue that the Milk  
10 Claims are precluded because they only target products that contain  
11 EJC. The Court disagrees. The Singer Settlement bars claims that  
12 relate to the use of the term EJC, not claims relating to products  
13 that contain EJC. Plaintiffs' Milk Claims are not predicated on  
14 Defendants' use of the term EJC. Rather, the Milk Claims are based  
15 on the theory that a reasonable consumer could confuse soymilk,  
16 almond milk, or coconut milk for dairy milk.

17 Accordingly, the Court finds that res judicata bars  
18 Plaintiffs' EJC and Yogurt Claims, but not their Milk Claims.  
19 Accordingly, the Court proceeds to determine whether the Milk  
20 Claims are preempted.

21 **B. Preemption**

22 The crux of Plaintiffs' Milk Claims is that Defendants' use of  
23 terms "soymilk," "almond milk," and "coconut milk" in the names of  
24 Silk Products violates the "standard of identity" for milk. A  
25 standard of identity is a requirement that determines what a food  
26 product must contain to be marketed under a certain name. The  
27 FDCA, as amended, contains a broad preemption provision which  
28 prohibits states or other political subdivisions from imposing any

1 requirements regarding standard of identity that is not identical  
2 to the federal requirements. 21 U.S.C. § 343-1(a). Defendants  
3 argue that Plaintiffs' Milk Claims attempt to impose new  
4 requirements concerning the standard of identity for milk.

5 The FDCA requires a food to be identified by "the common or  
6 usual name of the food, if any there be." 21 U.S.C. § 343(i). FDA  
7 regulations require that a "statement of identity" must be in terms  
8 of: (1) the name prescribed by federal law or regulation, "(2)  
9 [t]he common or usual name of the food; or, in the absence thereof,  
10 (3) [a]n appropriately descriptive term, or when the nature of the  
11 food is obvious, a fanciful name commonly used by the public for  
12 such food." 21. C.F.R. § 101.3(b).

13 Plaintiffs have not pointed to any statutory or regulatory  
14 provision prescribing how the Silk Products must be labeled.  
15 However, Plaintiffs do point to 21 C.F.R. § 131.110, which  
16 describes Milk as the "lacteal secretion, practically free from  
17 colostrum, obtained by the complete milking of one or more healthy  
18 cows." Plaintiffs reason that this regulation bars Defendant from  
19 using the name milk in connection with soy-, almond-, coconut-based  
20 products since those products do not come from cows. However, §  
21 131.110 pertains to what milk is, rather than what it is not, and  
22 makes no mention of non-dairy alternatives such as the Silk  
23 Products.

24 Plaintiffs also point to FDA warning letters to soymilk  
25 manufacturers, which are referenced in the Complaint. These  
26 letters primarily address sanitary conditions at the manufactures'  
27 facilities and other labeling issues which are not relevant to this  
28 case. See ECF No. 26 ("Pl.'s RJN) Exs. G, H. However, citing 21



1 C.F.R. § 131.110, the letters also warn two manufacturers that  
2 their "soymilk" products are misbranded because they use the term  
3 milk. ECF No. 26 ("Pl.'s RJN) Exs. G, H. An agency's reasonable  
4 interpretation of its own regulation is entitled to wide deference.  
5 Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 697 F.3d  
6 1192, 1199 (9th Cir. 2012). However, the brief statements in the  
7 two warning letters cited by Plaintiffs are far from controlling.  
8 This is especially true since the FDA regularly uses the term  
9 soymilk in its public statements, see, e.g., FDA Enforcement  
10 Report, 2011 WL 6304352 (Dec. 14, 2011); FDA Enforcement Report,  
11 2007 WL 4340281 (Dec. 12, 2007), suggesting that the agency has yet  
12 to arrive at a consistent interpretation of § 131.110 with respect  
13 to milk substitutes.

14 As the FDA has yet to prescribe a name for the Silk Products,  
15 the Court considers the "common or usual name[s]" for those foods.  
16 See 21 U.S.C. § 343(i). FDA regulations provide that the common or  
17 usual name of a food "shall accurately identify or describe, in as  
18 simple terms as possible, the basic nature of the food or its  
19 characterizing properties or ingredients." 21 C.F.R. § 102.5(a).  
20 "Each class or subclass of food shall be given its own common or  
21 usual name that states, in clear terms, what it is in a way that  
22 distinguishes it from different foods." Id. Moreover, the common  
23 or usual name may be established by common usage. Id. § 102.5(d).

24 Here, the Court agrees with Defendants that the names  
25 "soymilk," "almond milk," and "coconut milk" accurately describe  
26 Defendants' products. As set forth in the regulations, these names  
27 clearly convey the basic nature and content of the beverages, while  
28 clearly distinguishing them from milk that is derived from dairy

1 cows. Moreover, it is simply implausible that a reasonable  
2 consumer would mistake a product like soymilk or almond milk with  
3 dairy milk from a cow. The first words in the products' names  
4 should be obvious enough to even the least discerning of consumers.  
5 And adopting Plaintiffs' position might lead to more confusion, not  
6 less, especially with respect to other non-dairy alternatives such  
7 as goat milk or sheep milk.

8 Accordingly, the Court finds that Plaintiffs' Milk Claims are  
9 preempted.

10 **C. Plausibility**

11 Plaintiffs' Milk Claims fail for the additional reason that  
12 they are simply not plausible. False advertising claims under the  
13 UCL, FAL, and CLRA are governed by the reasonable consumer  
14 standard, whereby a plaintiff must show that members of the public  
15 are likely to be deceived. Williams v. Gerber Products Co., 552  
16 F.3d 934, 938 (9th Cir. 2008). The question of whether a business  
17 practice is deceptive is generally a question of fact not amenable  
18 to determination on a motion to dismiss. Id.

19 However, in certain situations a court may assess, as a matter  
20 of law, the plausibility of alleged violations of the UCL, FAL, and  
21 CLRA. For example, in Werbel ex rel. v. Pepsico, Inc., C 09-04456  
22 SBA, 2010 WL 2673860, at \*3 (N.D. Cal. July 2, 2010), the plaintiff  
23 alleged that he believed "Cap'n Crunch's Crunch Berry" cereal  
24 derived its nutrition from actual fruit because of its label's  
25 reference to berries and because its cereal balls were shaped like  
26 berries. The Court found such allegations to be "[n]onsense." Id.  
27 The court reasoned that the word "berries" was always preceded by  
28 the word "crunch" to form the term "crunch berries," and that the

1 image of crunch berries on the label did not even remotely resemble  
2 any naturally occurring fruit of any kind. Id.

3 Plaintiffs' Milk Claims fail for similar reasons. The crux of  
4 the claims is that a reasonable consumer might confuse plant-based  
5 beverages such as soymilk or almond milk for dairy milk, because of  
6 the use of the word "milk." The Court finds such confusion highly  
7 improbable because of the use of the words "soy" and "almond."

8 Plaintiffs essentially allege that a reasonable consumer would view  
9 the terms "soymilk" and "almond milk," disregard the first words in  
10 the names, and assume that the beverages came from cows. The claim  
11 stretches the bounds of credulity. Under Plaintiffs' logic, a  
12 reasonable consumer might also believe that veggie bacon contains  
13 pork, that flourless chocolate cake contains flour, or that e-books  
14 are made out of paper.

15 Thus, even if Plaintiffs Milk Claims were not preempted, they  
16 would still fail under the reasonable consumer test, as well as  
17 plausibility standard set forth in Iqbal and Twombly.

18  
19 **V. CONCLUSION**

20 For the reasons set forth above, Defendants' motion to dismiss  
21 is GRANTED, and Plaintiffs Alex Ang and Kevin Avoy's claims are  
22 DISMISSED WITH PREJUDICE.

23  
24 IT IS SO ORDERED.

25  
26 December 10, 2013



UNITED STATES DISTRICT JUDGE